SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-133

GORDON D. CLARK, *Petitioner*,

v.

OTEY JOHNSON, ET AL., *Respondents*.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court was an oral opinion and has not been reported. (See Petitioner's Appendix * C, A-25 - A-37.) The opinion of the Court of Appeals for the Tenth Circuit has not yet been reported. (See Pet. App. A, A-1 - A-22.) The order and opinion denying rehearing and rehearing en banc has not been reported. (See Pet. App. B, A-23 - A-24.)

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

* Cited hereinafter as "Pet. App."

QUESTIONS PRESENTED

1. Whether the Court of Appeals acted correctly in its review of the order of the lower court in which the lower court denied a surcharge and approved the final account of a trustee in bankruptcy.

2. Whether the Court of Appeals correctly construed and applied the standard of care to be exercised by a trustee in bankruptcy and followed this Court's teaching in *Mosser* v. *Darrow*, 341 U.S. 267 (1951).

3. Whether the Court of Appeals acted properly in reversing the lower court and correcting the lower court's erroneous interpretation of the doctrine of collateral or judicial estoppel.

4. Whether a trustee in bankruptcy acted in accordance with the orders of the court establishing the trust, followed the requirements of the Bankruptcy Act, and exercised the proper standard of care required of an officer of the court.

5. Whether in a final accounting of a trustee in bankruptcy the burden is upon the trustee to demonstrate to beneficiaries and creditors the reasonableness of expenditures which have been challenged.

STATUTES INVOLVED

§ 75. *Trustees; duties*

(a) Trustees shall . . .; (2) deposit all money received by them in designated depositories . . .; (5) keep records and accounts showing all amounts and items of property received and from what sources, all amounts expended and for what purposes and all items of property disposed of. . . .

Bankruptcy Act, 11 U.S.C.A. 75

§ 94. *Notices*

(a) Creditors shall have at least ten days' notice by mail, . . . of . . .; (5) the filing of all accounts of the receivers and trustees for which confirmation is asked, and the time when they will be examined and passed upon. . . .

Bankruptcy Act, 11 U.S.C.A. 94

§ 102. *Expenses of administering estates; unauthorized sharing of fees; withholding allowances*

(a) (1) The actual and necessary costs and expenses incurred by officers, other than referees, in the administration of estates shall, except where other provisions are made for their payment, be reported in detail under oath, and examined and approved or disapproved by the court. If approved they shall be paid or allowed out of the estates in which they were incurred.

Bankruptcy Act, 11 U.S.C.A. 102

§ 845. *Operation of business and management of property; reports*

The trustee or the debtor in possession shall have the power, upon authorization by and subject to the control of the court, to operate the business and manage the property of the debtor during such period, limited or indefinite, as the court may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate.

Bankruptcy Act, 11 U.S.C.A. 845

Federal Rules of Civil Procedure

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered

pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT

This case deals with an action by beneficiaries and creditors seeking to surcharge a trustee in bankruptcy for deficiencies in his account. The litigation concerns the manner in which a trustee in bankruptcy, appointed by order of the court, carried out the duties and responsibilities reposed in him as a fiduciary and an officer of the court by the Bankruptcy Act and by common law. The case also raises for consideration the duties imposed upon a court in its review and approval of accounts submitted by a trustee in bankruptcy.

The respondents are constrained to restate the facts as presented by the petitioner because significant facts [1] have been omitted. On August 5, 1958, Roy Johnson filed a petition for an arrangement under Chapter XII of the Bankruptcy Act. The United States District

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[1] The Court of Appeals in its opinion sets forth succinctly the significant operable facts. The respondents will in large measure follow this statement.

Court for the Eastern District of Oklahoma approved the proposed arrangement and confirmed the same on May 11, 1960. At that time, Petitioner Clark was appointed trustee.[2] The arrangement required the trustee to continue the business, to submit a profit and loss statement each month, to pay income from mortgaged property to secured creditors, and to pay the remaining income to the unsecured creditors. Subsequently, in 1960, Roy Johnson died. In 1961 the court ordered the trustee to submit annual *audits* to the court and creditors.[3] The annual reports which were submitted were unaudited and were prepared by accountants from figures furnished by a bookkeeper who was employed by Clark.

As soon as he was appointed trustee, Petitioner Clark had hired a bookkeeper, Billingsley,[4] and a secretary to assist in the management of the trust. The trustee did not have Billingsley bonded; yet he permitted Billingsley to handle all financial matters of the trust. Billingsley collected the mail, kept the books, made out the checks, reconciled the bank statements, and prepared monthly reports. Billingsley received all of the income of the trust and had absolute control over all expenditures. Besides being trustee, Petitioner Clark, who is a geologist, operated his own business and a

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[2] At the time the arrangement for creditors was proposed, Petitioner Clark advised the court that he expected the matter would not take more than four and a half years to resolve. To date, the trust is still in effect. The petitioner served as trustee until March 1, 1971. At the time of its creation, the trust was intended to continue for ten years.

[3] See respondents' Appendix.

[4] Billingsley had been previously employed by Roy Johnson and was familiar with Mr. Johnson's affairs.

partnership with his father. All were conducted in the same office, and Billingsley and the secretary performed services for all three businesses.

As of November, 1962, the working interests of the trust had been sold, the secured creditors paid, and only passive royalty interests were retained by the trust. After 1962, the activities of the trustee consisted almost entirely of depositing thirty royalty checks each month in the bank, filing a monthly report and an annual report with the court, and preparing annual tax returns for the trust. Distributions to the unsecured creditors were made on July 31, 1962; August 15, 1962; September 11, 1963; and July 31, 1968. The remaining reduction of debt amounted to approximately 30 percent. During the period that Petitioner Clark served as trustee, the trust earned approximately $700,000. Of that sum, $426,095.12 were consumed by administrative expenses.

During the period that Petitioner Clark served as trustee, he filed monthly statements and annual reports, copies of which were sent to creditors. However, the reports were not detailed as to the nature and purpose of the expenses, and there was no way to tell whether the expenses were reasonable and proper. No complaints were filed by creditors. Although in 1965 or 1966 Respondent Otey Johnson, a residuary beneficiary of the trust, had alerted Clark to a problem he had had with the bookkeeper,[5] Clark took no steps to supervise the actions of Billingsley nor to keep himself informed of the operation of the trust.

In 1969 in the course of preparing the annual tax return, accountants discovered a discrepancy which led

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[5] See Pet. App. A, A-14, note 7.

to further investigation and revelation that Billingsley had been embezzling money from the trust from its inception.[6] In sum Billingsley embezzled over $50,000 from the trust.

After discovery of the wrongdoing, Clark dismissed Billingsley, took legal steps to enjoin him from disposing of his property, and obtained a judgment against him. The trustee obtained permission from the court and instituted suit in his representative capacity to recover from the Exchange National Bank and Trust Company of Ardmore the trust funds deposited by Billingsley. In April, 1970, the trustee sought an order extending the life of the trust in order to pursue the Billingsley recovery. At the time the trustee sought the extension, he requested an order allowing liquidation of the assets and termination of the trust. The beneficiaries and some of the creditors objected to this. As a result, a hearing was held in October, 1970, in which the court directed the trustee to file a preliminary accounting. On December 17, 1970, Trustee Clark filed the requested preliminary final account. On January 21, 1971, the respondents, objecting creditors and beneficiaries, applied to the court to surcharge the trustee for the deficiencies attributable to Billingsley's embezzlement and also for alleged excessive administrative expenses. The respondents also requested that the trustee be denied the additional compensation which the plan would have given him.

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[6] The manner of the embezzlement is not relevant. However, it is interesting to note the simplicity of some of the practices. For example, Billingsley not infrequently raised his salary checks by $1,000 by placing a 1 before the proper salary figure. He also converted royalty checks by depositing them to his own account at the Exchange National Bank of Ardmore, which also served as depository of the trust.

In February, 1971, another hearing was held to consider modification of the arrangement to continue it for another year. The trustee objected to its continuation and resigned, whereupon the court ordered Clark to file a final report and ordered that the surcharge determination be delayed. On March 1, 1971, the First National Bank and Trust Company of Muskogee was named to succeed Clark. The successor trustee also replaced Clark as the plaintiff in the suit against the Exchange National Bank. In the state court trial, the successor trustee prevailed. In the proceeding before the state court to recover Billingsley's deposits from the bank, the matter of Trustee Clark's negligence in administering the trust estate and the manner in which he carried out his fiduciary duties was not in issue. The state court proceeding dealt only with the relationship between the trustee and the depository bank and the conduct of the bank.

A hearing on Clark's final report and request for discharge was held in August, 1971. At that time testimony and evidence were presented by the parties before Judge Edward Langley. Judge Langley took the case under advisement and on November 21, 1972, entered an order surcharging Clark $157,185.99. However, on January 2, 1973, Judge Langley vacated the order of surcharge. Another hearing was held on April 24, 1973. At the court's request, briefs were submitted by the parties. Before a decision could be made, Judge Langley died. By stipulation the case was then tried on the record by Judge Daugherty, and on April 19, 1974, oral arguments were made. On May 3, 1974, Judge Daugherty entered an order denying the surcharge and approving the final account of Clark.

As stated by the Court of Appeals, the trial court ruled:

> (1) That the judgment allowing the estate to recover against the Exchange National Bank somehow barred or prevented a surcharge in these proceedings. The court's reasoning was that the creditors and beneficiaries were barred from asserting a position inconsistent with that maintained in the prior proceeding;
>
> (2) The court was uncertain as to whether a reasonably prudent person could have detected Billingsley's conversions;
>
> (3) The court refused to surcharge for excessive administrative costs on the ground that it felt unable to conclude improper management by Clark warranting surcharge;
>
> (4) The court felt that the objectors were barred because of their failure to object to the reports which were filed regularly. The ruling was that they had either ratified or acquiesced;
>
> (5) The beneficiaries and creditors were barred by laches. They had not objected and thus it would be unfair to surcharge the trustee after passage of the years involved;
>
> (6) The court held that the misuse of the telephone and the making of gifts out of trust funds was de minimis;
>
> (7) The accounting expenses and legal expenses occasioned by the substantial losses to the trust were not chargeable under the totality of the facts; finally, the crowning blow was the court's ruling that the trustee was entitled to his 15% of the residue of the estate. (Pet. App. A, A-6-A-7.)

On appeal the respondents *challenged all of these rulings.* The entire record was submitted to the Court of Appeals for review. The parties submitted briefs

which explored fully all of the issues in the case,[7] and there was full oral argument. On May 29, 1975, the Court of Appeals filed its decision in which it found that the lower court erred in its findings of fact and conclusions of law. Accordingly, the Court of Appeals remanded the case to the lower court with directions to vacate its judgment in whole and render a new judgment surcharging the trustee for the losses suffered as a direct result of the misconduct of Billingsley. The trial court was directed to reconsider the attorney's fees and costs and expense items as well as the extra compensation items in light of the appellate court's decision and enter appropriate judgments consistent with the views expressed in the court's opinion.

On June 9, 1975, Petitioner Clark filed a request for a rehearing en banc which was denied on June 19, 1975. In its order, the court stated, "The panel . . . wishes to make it clear that it was not the purpose of the Court in its opinion to dictate the trial court's decision with respect to the award of attorney's fees or the allowance of costs and expenses, since these matters are within the discretion of that court." (Pet. App. B, A-24.)

ARGUMENT

The instant case deals with the administration of a particular trust estate. It focuses on the conduct of a particular trustee in the exercise of his fiduciary duties. The case turns on its own facts, and no amount of strained semantics can convert it into one warranting review by this Court on certiorari. The decision of the

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[7] On appeal, Petitioner Clark stated that there was but a single issue before the Court of Appeals: Were the findings of facts, conclusions of law, and judgment of the lower court in denying the surcharge of the former trustee clearly erroneous?

Court of Appeals has little if any impact on persons other than the immediate creditors and residuary beneficiaries who have been harmed by the actions of the trustee in this case.

The Court of Appeals in its review of the case found that the lower court had erred in its conclusions of law, and this error precluded the lower court from conducting the required examination of the trustee's conduct. The trustee had been charged with specific acts of negligence in the exercise of his fiduciary duties. The trustee was asked to justify and set forth the basis for administration expenses deemed excessive by the creditors and residuary beneficiaries. The lower court was requested to surcharge the trustee because he had breached his duties as a fiduciary and a trustee appointed by the court. Nonetheless, the lower court failed to conduct the detailed examination required by the law because it felt itself somehow precluded by a prior state court decision and because it felt that in its interpretation of the law, the creditors and residuary beneficiaries were barred by laches and ratification.

The Court of Appeals after review of the record concluded that not only had the lower court erred in its conclusions of law but no evidence could be found to support critical factual conclusions. A key element in the case was the fact that the trustee in bankruptcy had turned over for all practical purposes the management of the trust to an embezzling bookkeeper. The trustee took no action to bond this person; he took no steps to supervise him. The lower court made no findings as to whether such conduct constituted negligence. Instead, the lower court concluded that a prudent person would not have discovered the bookkeeper's embezzlement. After review of the record, the court concluded that

this finding was totally without evidentiary support—in short, clearly erroneous. (Pet. App. A, A-15.)

The decision of the Court of Appeals reflects no departure from established principles of law articulated by this Court. It presents no novel interpretation of the law nor any important question of federal law. At best, the decision sets forth in careful, well-reasoned and concise terms the standard of care expected of a trustee in bankruptcy. As the court made clear, a trusteeship is "serious business and is not to be undertaken lightly." (Pet. App. A, A-8.)

I.

The Decision Below Is Clearly Correct

Petitioner asserts that the Court of Appeals so departed from the usual and accepted review procedures as to constitute plain and simple error. (Petition, pp. 15-18.) This is incorrect. The Court of Appeals observed faithfully the requirements of Rule 52(a) of the Federal Rules of Civil Procedure. The rule in the tenth circuit, as in other circuits, is that the findings of the lower court sitting without a jury will not be disturbed unless they are clearly erroneous.[8] *Norman* v. *Young*, 422 F.2d 470 (10th Cir. 1970); *United States* v. *Gold-*

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[8] In this case, considerable testimony was presented before Judge Langley, who died before he could render a decision. The case was later tried by Judge Daugherty on the record without the opportunity to assess the credibility and demeanor of the witnesses. Even though the parties stipulated to a trial on the record, the credibility of the witnesses was an implicit factor for consideration. In such a case, the findings of the court do not have the same binding effect. F. W. Stock & Sons v. Thompson, 194 F.2d 493 (6th Cir. 1952); see also, United States *ex rel.* Ackerman v. Russell, 388 F.2d 21 (3d Cir. 1968); United States Fidelity

field Corp., 384 F.2d 669 (10th Cir. 1967); *Epperson* v. *Connecticut Fire Insurance Co.*, 314 F.2d 486 (10th Cir. 1963). Nonetheless, a finding is "clearly erroneous" when, after review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1965); *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364 (1948); see also, *Casner* v. *Commissioner*, 450 F.2d 379 (5th Cir. 1971). Further, the "clearly erroneous" rule does not apply if the trial court has committed an error of law which has manifestly influenced or controlled its findings of fact, *Ammerman* v. *Miller*, 488 F.2d 1285 (D.C. Cir. 1973); *Case* v. *Morrisette*, 475 F.2d 1300 (D.C. Cir. 1973); *Darter* v. *Greenville Community Hotel Corp.*, 301 F.2d 70 (4th Cir. 1962); *Allis Chalmers Mfg. Co.* v. *Wichman*, 220 F.2d 426 (8th Cir.), *cert. denied*, 350 U.S. 835 (1955); *Owen* v. *Commercial Union Fire Ins. Co.*, 211 F.2d 488 (4th Cir. 1954), or has applied an improper legal standard, *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1372 (5th Cir. 1974); *International Union of Operating Engineers, Local 627* v. *Arthurs*, 480 F.2d 603 (10th Cir. 1973); or if the finding is unsupported by the evidence in the record. *Case* v. *Morrisette, supra; United States ex rel. Paxos* v. *Run-*

& Guaranty Co. v. State of Oklahoma, 383 F.2d 417 (10th Cir. 1967). Moreover, where certain facts are undisputed, as in this case, and there is no issue of credibility and the Court of Appeals is called upon to apply reason and interpretation, the "clearly erroneous" rule has been held to yield. It has been held that the appellate court is in as good a position as the trial court to evaluate the testimony and evidence. Frazier, III v. Alabama Motor Club, Inc., 349 F.2d 456, 458 (5th Cir. 1965); see also, American National Bank v. United States, 421 F.2d 422, 451 (5th Cir. 1970).

dle, 491 F.2d 447 (3d Cir. 1974); see generally, 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, Civil §§ 2571, 2585. Under these established principles, the Court of Appeals rendered its decision. It determined that the lower court had erred in its conclusions of law in several regards: (1) in holding that the successor trustee and the creditors and beneficiaries were barred by the doctrine of judicial or collateral estoppel in claiming Clark was negligent [9] (Pet. App. A, A-11); (2) in applying the doctrines of laches and ratification to claims of the beneficiaries and creditors [10] (Pet. App. A, A 17 - A-19); and (3) in charging the trust with expenses necessitated by the negligence of the trustee[11] (Pet. App. A, A-19 - A-20). In its overall view of the record, there can be little doubt that the Court of Appeals was left with the firm and abiding conviction that a mistake had been committed.[12] In the view of the appellate court, this was a clear case of misfeasance. It is the beneficiaries, those who were to be protected by the fiduciary, who as a consequence of the lower court's decision have been made to suffer the hardship. As the Court of Appeals stated in its review of the evidence,

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[9] This point will be covered in greater detail in respondents' succeeding argument *infra,* pp. 18-20.

[10] See RESTATEMENT OF TRUSTS (Second) §§ 172, 173, 216-219; see also, Davis v. Jones, 254 F.2d 696 (10th Cir.), *cert. denied,* 358 U.S. 865 (1958).

[11] Crutcher v. Joyce, 146 F.2d 518 (10th Cir. 1945).

[12] After reviewing all the record evidence, the appellate court was convinced that the trustee had mismanaged the estate and was constrained to state, "[F]inally the crowning blow was the court's ruling that the trustee was entitled to his 15% of the residue of the estate." (Pet. App. A, A-7.) This would have been compensation in addition to the $500 per month already paid for administering a relatively passive trust.

"the equities in the case are overwhelmingly on the side of the appellants." (Pet. App. A, A-19.)

II.

There Is No Important Question of Federal Law

The petitioner contends that the Court of Appeals has misapplied this Court's decision in *Mosser* v. *Darrow*, 341 U.S. 267 (1951), and established a new standard of care for fiduciaries (Petition, pp. 19-24, 29-33). The petitioner strains credulity and semantics to create an argument out of whole cloth. The Court of Appeals in its decision has simply articulated and applied the standard of care and diligence established for fiduciaries and trustees in bankruptcy.

The appellate court's reliance on *Mosser* served simply as a touchstone to emphasize the fact that "a trusteeship is a serious business and not to be undertaken lightly or so discharged. The most effective sanction for good administration is personal liability for the consequences of forbidden acts." 341 U.S. 271.[13] The Court of Appeals stated and applied to the facts before it principles of law in accord with the decisions of this Court. There can be little doubt from a reading of the Court of Appeals decision that the court expected the trustee to have exercised such care and skill as a man of ordinary prudence would exercise in dealing with his own property.

> By the common law every trustee or receiver of an estate has the duty of exercising reasonable care in the custody of the fiduciary estate unless relieved

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[13] The appellate court itself recognized that the cases were not alike on their facts. However, the duty of reasonable care was the same. (Pet. App. A, A-10.)

of such duty by statute or order of court. *United States ex rel. Willoughby* v. *Howard,* 302 U.S. 445, 450 (1938).

United States v. *Mason,*[14] 412 U.S. 391 (1973); see also, 2A SCOTT, TRUSTS 1408 (3d ed. 1967). It is well settled that if trust property is lost or destroyed or diminished, the trustee is subject to surcharge if he has failed to exercise the required care and skill. 412 U.S. at 398; *Chappel* v. *First Trust Co.,* 30 F. Supp. 765 (E.D. Wis. 1940); *Carson, Pirie, Scott & Co.* v. *Turner,* 61 F.2d 693 (6th Cir. 1932); *In re B. A. Montgomery & Son,* 17 F.2d 404 (E.D. Ohio 1927).

The Court of Appeals articulated no new standards nor departed from established principles. The decision properly corrected the trial court's erroneous application of the law with regard to (1) collateral or judicial estoppel, (2) the doctrines of laches and ratification, and (3) the duty of the lower court in approving the final account.

The law is well established that the trustee in bankruptcy is an officer of the court subject at all times to the orders of the court in the administration of the bankrupt's assets.[15] *In re Mississippi Valley Iron Co.,* 58 F. Supp. 222 (D. Mo. 1944). The district court in the case at bar did not scrutinize the actions of the trustee in light of the specific charges which were raised by the respondents, residuary beneficiaries and creditors. Clearly, the trustee in this case delegated

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[14] The petitioner has cited this case in support for its argument that the appellate court has misapplied this Court's opinion in Mosser. Yet it is clear that the appellate court is applying the same standard of care.

[15] The trustee did not follow the 1961 order of the court which directed the filing of annual audits.

the duties of his office to an embezzling subordinate. The law is clear that there can be no such delegation. *Connelly* v. *Hancock, Dorr, Ryan & Shove,* 195 F.2d 864 (2d Cir. 1952).

The trial court under its mistaken view of the law did not impose upon the trustee the duty of accounting in detail the nature and purpose of the challenged administrative expenses. See Bankruptcy Act (11 U.S.C.A. §§ 75, 102). The law in this regard is clear. When seeking approval and confirmation of his report, the burden is upon the trustee to show the nature of each challenged transaction, to show that the trust was administered in accordance with the trust instrument, and to show that the trustee acted honestly and with fidelity to the trust reposed in him. *Davis* v. *Jones, supra* note 10; *Chisholm* v. *House,* 183 F.2d 698 (10th Cir. 1950); *Earll* v. *Picken,* 113 F.2d 150 (D.C. Cir. 1940). Because the facts with regard to the expenditures of the trust are peculiarly within his knowledge, the burden to justify the expenditures is on the trustee, not upon the beneficiaries. *Tucker* v. *Dr. P. Phillips Co.,* 139 F.2d 601 (5th Cir. 1943); see also, RESTATEMENT OF TRUSTS (SECOND) §§ 172, 173.

In the facts of this case, the appellate court found that the trial court misapplied the doctrines of laches and ratification to work an unconscionable hardship on those whom the trust was intended to protect. (Pet. App. A, A-16 - A-19.) The respondents acted in timely fashion, in accord with the provisions of the Bankruptcy Act, to challenge the petitioner's final account. 11 U.S.C.A. § 94(a). Prior to the filing of the preliminary report and the final report, the court held no hearings nor did it approve the unaudited reports which had

been filed by the trustee.[16] No opportunity was afforded to challenge the trustee's account. As soon as the trustee presented his account, the respondents moved to challenge. As is evident from the foregoing, there is no important question of federal law presented.

III.

There Is No Conflict with the Decisions of Other Courts

The jurisdiction of the court in bankruptcy is exclusive. *United States Fidelity & Guaranty Co.* v. *Bray,* 225 U.S. 205 (1912). It was the duty of the bankruptcy court in this case to determine whether Trustee Clark discharged his duties and responsibilities as a fiduciary and representative of the court in a proper manner. The trial court did not perform its required duty. Instead, the trial court determined that the creditors and beneficiaries were barred by the doctrine of collateral or judicial estoppel as a consequence of a prior state court proceeding involving a suit by the trustee in his representative capacity to recover funds embezzled from the trust under his charge.[17] The appellate court determined that the lower court was in error in this matter and in its analysis of the case law. (Pet. App. A, A-11 - A-14.) The decision of the Court of Appeals in this regard is not in conflict with any

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[16] By order of the court in 1961, the trustee was directed to file annual audited reports. This was not done. The reports that were filed were unaudited and were based upon the figures furnished to accountants by the embezzling bookkeeper, Billingsley. The reports were general in nature and could not have furnished the court with information as to the reasonableness of the charges or the nature and purpose of such expenditures. (Pet. App. A, A-2, A-4, A-15-A-17.)

[17] The embezzlement would not have taken place but for the trustee's negligence.

decisions of this Court, the federal courts, nor any state court. Analysis of the cases cited by the petitioner discloses no such conflict. The Court of Appeals decision is a correct statement of the law. In order for the doctrine of collateral or judicial estoppel to apply, there must be identity or privity of parties and identity of the subject matter or issues. Neither requirement is satisfied in this case.

The suit in the state court involved the trustee *in his representative capacity.* The instant proceeding involves an action against the trustee *in his individual capacity.* It is well settled that when a person appears in two suits in different capacities, a judgment rendered in one suit has no conclusive force in the other, if the person is a party to one suit solely as an individual and is a party to the other solely in his representative capacity. See generally, 1B MOORE, FEDERAL PRACTICE § 0.411, at 1421-1448 (2d ed. 1953); see also, *Baum* v. *Continental Illinois National Bank & Trust Company,* 230 F.2d 115 (7th Cir. 1956). This principle is also well stated in *Hartford National Bank & Trust Company* v. *Malcolm-Smith,* 129 Conn. 67, 26 A.2d 234 (1942); see also, RESTATEMENT OF JUDGMENTS §§ 80(a), 85, comment n; 54 AM. JUR. 2d *Trusts* § 632.

The second element necessary to the application of the doctrine is also missing in this case. Clearly, the state court did not have before it nor did it decide the specific allegations of negligence charged by the respondents. The state court did not have before it the key issue of the improper delegation of fiduciary duties, nor did it have to consider the reasonableness of the trustee's expenditures; all of these matters had to be decided by the court in bankruptcy. As the Court of Appeals succinctly stated, "The beneficiaries and

creditors are no more barred by the judgment in the Oklahoma suit than the district court would be barred from surcharging the trustee." (Pet. App. A, A-12.)

The petitioner has demonstrated no basis which would warrant review by this Court on certiorari. The petitioner asserts an interpretation of Section 845 of the Bankruptcy Act is at stake. This is not correct. The only question involved in this whole case is whether Trustee Clark performed his duties as a fiduciary in accord with the required standard of care. In the judgment of the Court of Appeals, under the established legal principles, he did not and should be surcharged for his deficiencies. The amount of the surcharge has been left to the discretion of the lower court on remand.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

On this 10th day of September, 1975, the undersigned certifies that three exact copies of this Brief for Respondents in Opposition have been directed by United States Mail, postage prepaid, to each of the following addressees, to wit:

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same being attorneys of record for the petitioners herein.

MICHAEL S. YAROSCHUK

APPENDIX

IN THE FEDERAL DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

(Judge Rice, presiding)

IN THE MATTER OF ROY M. JOHNSON, *Debtor.*
BK-8330

Order

(Filed February 15, 1961)

Upon Application of the Trustee herein, Gordon D. Clark, it is hereby ORDERED that annual audit shall be filed by the Trustee on or before the first day of September, 1961, reflecting the operations of said Trust from inception to July 31, 1961.

It is FURTHER ORDERED that future annual audits shall be filed by the Trustee on or before the first day of September of each year reflecting the operations of said Trust for the past fiscal year ending July 31st of each year.

It is the FURTHER ORDER of the Court that each creditor shall be mailed a copy of said audit at the time of filing same with the Clerk of this Court.

DATED this 15th day of February, 1961.